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Private Motivation State Action and the Allocation of Responsibility for Fourteenth Amendment Violations

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PRIVATE MOTIVATION, STATE ACTION AND THE ALLOCATION OF RESPONSIBILITY FOR FOURTEENTH AMENDMENT VIOLATIONS

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In light of the substantial volume of scholarship concerning the state action requirement of the fourteenth amendment,[1] some read-

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1 To compile a complete listing of the scholarship concerning the state action requirement is difficult. Consequently, what follows is only a partial listing: LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND? (1988); Glenn Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); James D. Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 OR. L. REV. 227 (1945); Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503 (1985); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221; Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331 (1982); Louis Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Jody Young Jakosa, *Parsing Public from Private: The Failure of Differential State Action Analysis*, 19 HARV. C.R.-C.L. L. REV. 193 (1984); Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Thomas P. Lewis, *The Sit-in Cases: Great Expectations*, 1963 SUP. CT. REV. 101 [hereinafter Lewis, *The Sit-in Cases*]; William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U.L. REV. 558 (1985); Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977); Monrad G. Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None"*, 1964 SUP. CT. REV. 137; Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Thomas G. Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976); Ronna Greff Schneider, *State Action—Making Sense out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985); Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129; Theodore J. St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Mark Tushnet, Shelley v.

ers may have concluded that nothing more can be said on the subject.[2] The basis for this voluminous commentary is the first three words of the second sentence of the fourteenth amendment: "No state shall . . . ."[3] Those words, which do not sound controversial,[4] are the source of complex questions of interpretation over which courts and scholars alike have struggled for more than a century. Much of the early scholarship suggested that the Supreme Court's state action cases could not be explained by any coherent doctrine, and several of the later commentators proposed that the state action inquiry be eliminated altogether. Contrary to the recent trend in state action literature, this Article suggests that distinguishing state action from private action is not only consistent with the fourteenth amendment, but also provides a coherent, logical approach to the state action cases.

Notwithstanding the various proposals of the commentators, the Supreme Court has continued to confuse the question of whether state action is present with the question of whether a particular state action violates the Constitution. For example, in *Shelley v. Kraemer*,[5] the Court discussed at great length whether the state action requirement was satisfied,[6] although action by the state, in the form of the Missouri state court's decision to enforce a racially restrictive covenant, was "entirely obvious."[7] The difficult question in

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Kraemer *and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219; William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

2 Or, as Professor Black put it over twenty years ago, " 'State action' again?" Black, *supra* note 1, at 69.

3 U.S. CONST. amend. XIV, § 1. The entire sentence reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

4 Indeed, as early as 1879, the Supreme Court apparently had no difficulty in recognizing that the fourteenth amendment applied to state action and not to private conduct. *See Ex parte* Virginia, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States . . . ."); Virginia v. Rives, 100 U.S. 313, 318 (1879) ("The provisions of the Fourteenth Amendment . . . have reference to State action exclusively, and not to any action of private individuals.").

5 334 U.S. 1 (1948).

6 *See* GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 1491 (1986).

7 Wechsler, *supra* note 1, at 29. That the majority devoted so much of the opinion to discussing whether state action was established is puzzling in light of the majority's conclusion: "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Shelley*, 334 U.S. at 14.

Shelley was whether the Missouri court's order amounted to a denial of equal protection,[8] yet the majority in *Shelley* deemed it "clear" that the Missouri court's enforcement of the covenant violated the fourteenth amendment.[9] Similarly, in *Moose Lodge No. 107 v. Irvis*,[10] the plaintiff sought an injunction ordering the Pennsylvania Liquor Authority to revoke the liquor license of the Moose Lodge because the Lodge discriminated on the basis of race in its membership and guest policies.[11] The granting of a liquor license by a state agency was unquestionably state action within the meaning of the fourteenth amendment. The only real issue, then, was whether that action was unconstitutional. Unfortunately, the Court, instead of explaining why Pennsylvania's action did not violate the fourteenth amendment, stated that "the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."[12] And in *Flagg Bros. v. Brooks*,[13] the Court considered whether a private creditor's use of a remedy authorized by a state statute was "properly attributable" to the state,[14] when it should have questioned the constitutionality of the state statute that authorized the creditor's remedy.

The purpose of this Article is to reconsider the state action cases[15] in which the Supreme Court has confused the state action inquiry with the question of whether the state action violates the fourteenth amendment. This Article suggests that the Court could

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8 The plaintiffs who brought the suit to enforce the covenant argued that its enforcement would not deny defendants the equal protection of the laws "since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property." *Shelley*, 334 U.S. at 21; *cf.* Wechsler, *supra* note 1, at 29 (suggesting that *Shelley*—which held that "the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is . . . free to make"—is not based on a neutral principle of constitutional law).

9 *Shelley*, 334 U.S. at 20.

10 407 U.S. 163 (1972).

11 *Id.* at 165.

12 *Id.* at 177.

13 436 U.S. 149 (1978).

14 *Id.* at 151-52.

15 This Article does not consider the so-called public function cases, although they may be interpreted as imposing a duty on the state to act as discussed *infra* note 160. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (primary election conducted by a private political party subject to the requirements of the fifteenth amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (company-owned town governed by the first amendment). The Supreme Court has distinguished the public function analysis from the state involvement cases, and the Court has not used the public function rationale to decide a case for a number of years.

end this confusion by first distinguishing acts of state actors[16] from acts of private persons and then determining who was actually responsible for the alleged harm. If the Court were to conclude that the state actors were responsible, it should proceed to determine whether that state action was unconstitutional. The thesis of this Article is that state action should be deemed to violate the Constitution in two categories of cases: first, when the acts of state actors provide the impetus for private conduct that would be unconstitutional if done directly by the state actors, and second, when the impetus for the alleged harm comes from the private party, but the state action would be unconstitutional had no private initiative been involved.

This Article is divided into three parts. Part I proposes a broad definition of state action as any official action taken by governmental units or their agents.[17] It argues that sound reasons support the recognition of differences between state action and private action even though private action may cause the same harm as state action in some quantifiable sense.[18] The distinction between private action and state action discussed in Part I is important, notwithstanding my expansive definition of state action, because the state action itself is not always responsible for the alleged deprivation of a constitutional right.

Part II explains why state action should be deemed to violate the fourteenth amendment when it provides the impetus, by way of compulsion or encouragement, for those private acts that would be unconstitutional if they were undertaken by the state. It also demonstrates how the proposed compulsion/encouragement approach applies to particular cases.[19]

Part III considers cases in which the impetus for the alleged harm comes from a private party. It argues that the state may not be involved in actions that otherwise would be unconstitutional but for the fact that the initiative for the alleged harm came from a private party. Part III applies this approach to real and hypothetical cases in which the state enforced private wishes or private arrangements or vindicated private interests.[20]

The approach proposed in this Article directs the Court's focus in state action cases to the correct issue: was the challenged state

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16 I use the term "state actors" to denote federal or state governments, local governmental units, agencies, officials, or employees—in other words, bodies or persons who derive their authority from the government.

17 *See infra* notes 28-30 and accompanying text.

18 *See infra* notes 48-57 and accompanying text.

19 *See infra* notes 58-161 and accompanying text.

20 *See infra* notes 162-208 and accompanying text.

action responsible[21] for the harm that is alleged to constitute the deprivation of a constitutional right?[22] The approach is also useful because it avoids the artificial "attribution" of some private action to the state, a technique used by the Court in some cases.[23] Most importantly, it preserves the public/private dichotomy in a manner consistent with the language and long-accepted understanding of the fourteenth amendment.[24] By maintaining this distinction between state action and private conduct, this approach promotes both individual autonomy and federalism, values identified by the Supreme Court as significant functions of the state action requirement.[25]

I

The term "state action" does not appear in the fourteenth amendment itself;[26] presumably it was coined by the Court. The amendment simply states that "[n]o State shall"[27] violate equal protection or due process principles. If the words are given their ordinary meaning, then state action should be understood as any action[28] taken by a state or a state actor using authority derived from the state, regardless of whether the action is authorized by, or contrary to, law.[29] In fact, the Supreme Court has defined state ac-

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21 I use the phrase "responsible for the harm" rather than "causes the harm" because the concept of proximate cause connotes foreseeability. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984). Foreseeability would not adequately limit liability for state action. For example, it is reasonably foreseeable that private parties will do many things that are not prohibited by the state. The state, however, should not be held responsible for all these private acts merely because they are foreseeable. *See infra* notes 146-61 and accompanying text.

22 The Supreme Court has recognized that allocating the responsibility for constitutional violations is a function of the state action doctrine. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("It . . . avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.").

23 *See, e.g., id.* at 937, discussed *infra* at notes 114-17 and accompanying text; Flagg Bros. v. Brooks, 436 U.S. 149, 151-52 (1978), discussed *infra* at notes 106-13 and accompanying text.

24 *See infra* notes 51-57 and accompanying text.

25 In *Lugar*, the Court stated that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." 457 U.S. at 936. Regarding federalism, the Court noted that "[a] major consequence [of the state action doctrine] is to require the courts to respect the limits of their own power as directed against state governments and private interests." *Id.* at 936-37.

26 *See supra* note 3.

27 U.S. CONST. amend. XIV, § 1.

28 Conscious inaction by a state or a state actor should also be considered state action. *See infra* notes 146-48 & 161 and accompanying text.

29 Acts of state officials or employees may be contrary to controlling law, or beyond the legal authority conferred, yet still be considered state action. As the Court explained,

tion in similar terms. As early as 1879, the Court stated:

> [T]he prohibitions of the Fourteenth Amendment . . . have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State goverument, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.[30]

Notwithstanding this obvious meaning of the concept of state action, Professor Sunstein has asserted that the courts have used a different definition: "The cases confirm that the state action inquiry is not a search for whether the state has 'acted,' but instead an examination of whether it has deviated from functions that are perceived as normal and desirable."[31] Although Professor Sunstein's characterization of this normative definition as descriptive of what courts have done in many state action cases is undoubtedly empirically correct, it has the effect of collapsing the state action inquiry into the determination of the constitutionality of the state action.[32] Acts by a state actor which are "normal and desirable" governmental activity should not be insulated from review under the fourteenth amendment. And suggesting that acts by government actors constitute state action only when those acts are "desirable"[33] or "legiti-

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> [t]he settled construction of the [Fourteenth] Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. . . . That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913).

30 *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879).

31 Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 887 (1987). According to Professor Sunstein, the state action determination "has always depended on a baseline establishing the legitimate or at least ordinary functions of government" and the courts have "relied on common law baselines like those in *Lochner*." *Id.* at 886.

32 The analysis of fourteenth amendment cases suggested here requires a two-step inquiry: first, is state action involved, and then, is that state action unconstitutional.

33 Sunstein, *supra* note 31, at 887.

mate"[34] seems implicitly to resolve the ultimate issue: when an act by a state actor is "desirable" or "legitimate," it will probably be deemed constitutional.

Professor Sunstein has also stated that a definition of state action based on the ordinary meaning of the words "would be inadequate" because "[s]tate officials are involved in the enforcement of private contract, tort, and property law every day, and their involvement does not subject all private arrangements to constitutional constraints."[35] His observation, though true, does not lead inexorably to the conclusion that defining state action to mean any official act by a state actor is "inadequate." Like the Court, he has confused the state action inquiry with the question of whether the conduct of state actors should be measured by the principles of the fourteenth amendment. Enforcement of private arrangements by state courts or state police is state action, according to the ordinary meaning of those words, but this recognition does not "subject all private arrangements to constitutional constraints." The private action being enforced is still private and therefore not subject to the restrictions in the fourteenth amendment. Nonetheless, constitutional standards do apply to the state action of enforcement and, in a constitutional challenge to such enforcement, the court must determine whether that state action is consistent with applicable constitutional provisions.[36] Professor Sunstein runs into a similar problem when he discusses state inaction: "When the government fails to provide protection against private racial discrimination, the failure is said not to be 'state action' and thus raises no constitutional question."[37] According to the common-sense definition of state action suggested here, however, a state's failure to prohibit private racial discrimination *is* state action, but that state action does not necessarily violate the fourteenth amendment.[38]

Other commentators have attempted to avoid the problem of defining state action by proposing that the state action inquiry be eliminated because it serves no function independent of the substantive determination of the constitutionality of the challenged practice. They have argned that the state action cases should be resolved by balancing the interests of the plaintiff against those of the defendant, who is claimed to have violated the plaintiff's rights. Professor (now Judge) Williams was one of the earliest proponents of this approach. He asserted:

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34 *Id.* at 886.

35 *Id.*

36 For a discussion *Shelley v. Kraemer* and other enforcement cases, see *infra* notes 162-208 and accompanying text.

37 Sunstein, *supra* note 31, at 886.

38 *See infra* notes 146-61 and accompanying text.

> A court decision resolving a private legal dispute is state action. Police action in the enforcement of a private interest is state action. . . . Indeed, all rights of private property and of contract are based upon state law. So the enforcement of these laws is state action.
>
> The result is that it is difficult to conceive of situations where state action is not present.[39]

He concluded that "the state action limitation, as a limitation, has substantially disappeared"[40] and that the proper approach to resolving the cases was to balance the interests of the challenger against the interests of the defendant.[41] Professors Glennon and Nowak have taken a similar position. They argued that the Supreme Court has "effectively removed any semblance of meaning from the state action requirement"[42] and that in fact "the Court decides state action cases by balancing the values which are advanced or limited by each of the conflicting private rights."[43] Similarly, Professor Chemerinsky suggested that "[i]f the state action requirement were abolished, the courts in each instance would determine whether the infringer's freedom adequately justified permitting the alleged violation;"[44] in other words, the "courts would have to balance."[45]

The problem with a balancing approach is that it ignores the value of distinguishing state action from the acts of private parties. Indeed, the proponents of balancing have argued that we should not make such a distinction. Professor Chemerinsky stated that "private infringements of basic freedoms can be just as harmful as governmental infringements."[46] To support his position, he

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39 Williams, *supra* note 1, at 367 (citing Horowitz, *supra* note 1, at 209).

40 *Id.*

41 *Id.* at 369, 370-71, 372, 373, 375, 378, 387. For example, Professor Williams characterized the issue in *Shelley v. Kraemer* as "whether in the balancing of interests the right of the individual to discriminate must overweigh the constitutional interest against discrimination." *Id.* at 373.

42 Glennon & Nowak, *supra* note 1, at 222.

43 *Id.* at 226-27. For example, Glennon and Nowak interpreted *Shelley v. Kraemer* as balancing "the interest of a former owner of property [against] the current owner's desire to sell to a member of a racial minority and the injury done to members of a minority race by restrictive covenants." *Id.* at 239. They read *Evans v. Newton* as a balancing of "the worth of private ownership of a park which is otherwise open to the public and the injury inflicted upon members of racial minorities who are publicly excluded from that area." *Id.* at 245. And in *Reitman v. Mulkey*, "[t]he Court effectively balanced the right of the current populace of California to have guaranteed freedom from open housing laws against the burden on racial minorities from being denied access to the legislature for redress of their problems." *Id.* at 247.

44 Chemerinsky, *supra* note 1, at 506. He asserted that the state action requirement "is anachronistic, harmful to the most important personal liberties, completely unnecessary, and even detrimental to the very goals that it originally intended to accomplish." *Id.*

45 *Id.*

46 *Id.* at 510. Professor Chemerinsky went even further: he suggested that "the

pointed to "the large concentrations of wealth and power in private hands."[47]

Obviously, the harm inflicted by private parties can be at least as great, in some quantifiable sense, as that inflicted by governmental actors. There is, nevertheless, an important difference between actions taken by government and those taken by private actors. One might characterize this difference as symbolic, but such a description would not be entirely satisfying.[48] More precisely, when a private party acts, he does so on his own behalf (or perhaps on behalf of his private employer or a private contractor who is paying for his services). The motivation for that action is private. In contrast, the actions of government officials are ostensibly taken on behalf of the citizens they represent. The motivations for their actions should reflect not the actors' private interests but should emerge from the actors' responsibility to act in the public interest. The representative nature of their roles is more than symbolic; it is real. Government actors ultimately derive their authority and power from the citizenry, who expect them to actively promote the public interest.

Compare, for example, the situation of a private detective who commits an assault in the course of an investigation with that of a police officer who commits an identical assault in the course of an arrest. In each case, the severity of the victim's injuries may be identical. Or consider a hypothetical client who is refused tax advice from a private attorney who harbors feelings of racial animus against the client. Would the situation be different if the same client were to seek tax information from the Internal Revenue Service and be turned away because of his race? The harm, the denial of tax information, is the same in both cases. And what difference does it make to the owner whether his property is sold, without notice or a

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need for court protection from private actions arguably is greater because democratic processes, no matter how imprecise a check, impose some accountability and limits on the government." *Id.* at 511.

47 *Id.* at 510. Professor Tushnet recently made the same point: he stated that "it is doubtful that one could defend the proposition that governments in the contemporary United States are in fact in a better position to inflict harm than private actors" and he asked his readers to "compare the power of the City of New York, which is highly constrained by a complex political system, with the power of General Motors, which is not." Tushnet, *supra* note 1, at 392.

48 Professor Tushnet acknowledged such an argument when he noted that state action may be thought to "betray the trust of the citizenry, eliciting harm captured in a statement like, 'But you're supposed to be on my side!' " *Id.* at 394-95. He gave the argument short shrift, however:

> I doubt that, at least in terms of subjective experience, people feel much different when their power or water supplies are cut off pursuant to the summary procedures adopted by a private utility . . . than when the same supplies are cut off pursuant to equally summary procedures adopted by a municipal utility . . . .

Id. at 394.

hearing, by a private storage company or by a sheriff? The value of the lost property is identical in both cases.

Although the harms suffered by the victims in each of these hypothetical cases appear to be the same, there is a significant difference between them. The private detective is acting only on his client's behalf, not for the public. The attorney chooses clients for private reasons, whereas the IRS agent is a public servant. And the storage company, unlike the sheriff, does not represent the government when it sells the property. There is a special relationship between government and the governed that simply does not exist between private parties.

Justice Brennan expressed a similar view about the difference between state and private action in the context of race discrimination:

> The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination.[49]

Those statements apply equally to each of the values embodied in the equal protection and due process clauses. Acts that undermine those values "are singularly grave when government has or shares responsibility for them."[50]

Perhaps this explains why the fourteenth amendment was drafted to prohibit only state action that violates equal protection and due process principles.[51] The Supreme Court, in its earliest fourteenth amendment decisions, understood the amendment as distinguishing between state action and private action and restricting only the former. In *Virginia v. Rives*,[52] decided in 1879, the Court stated that "[t]he provisions of the Fourteenth Amendment . . . have reference to State action exclusively, and not to any action of private individuals."[53] The Court reaffirmed its understanding of the fourteenth amendment a few years later in the *Civil Rights*

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49 Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part).

50 *Id.* at 190.

51 *But see* Chemerinsky, *supra* note 1, at 511-15 (arguing that the Constitution and the fourteenth amendment were not drafted to apply to private action "because it was thought that the common law protected individual rights from private interference").

52 100 U.S. 313 (1879).

53 *Id.* at 318.

Cases:[54] "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."[55] The Court has continued to interpret the fourteenth amendment based on the distinction between state and private action. In *Shelley v. Kraemer*,[56] the Court stated:

> Since the decision of this Court in the *Civil Rights Cases*, . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[57]

The approach to state action cases proposed in this Article, which distinguishes between state action and private action, is consistent with the Court's understanding of the fourteenth amendment and with its recoguition that action by state actors is special because it occurs in the context of the relationship between citizens and their government.

Although the broad definition of state action suggested in this Article leads to the conclusion that state action is present in a wide variety of situations, the distinction between state action and private action remains important. This broad definition merely shifts the attention to the correct issue: whether a given state action is actually responsible for the alleged constitutional violation. Separating state action from private action is necessary to allocate responsibility for the harm alleged to be inconsistent with fourteenth amendment values.

II

If the ordinary meaning of the term "state action" is employed in a case in which a violation of the fourteenth amendment is alleged, and the court has determined that the state action requirement is satisfied (because the state or a state actor has acted[58]), the court must then consider whether that state action is constitutional. This task is quite straightforward when the only actors in the case are state actors. It becomes more problematic when the alleged constitutional violation involves action by both state actors and private parties. The Supreme Court has used a variety of tests to decide such cases, including whether "to some significant extent the State in any of its manifestations has been found to have become

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54 109 U.S. 3 (1883).
55 *Id.* at 11.
56 334 U.S. 1 (1948).
57 *Id.* at 13.
58 *See supra* notes 28-30 and accompanying text.

involved in" the harmful private conduct,[59] "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may fairly be treated as that of the State itself,"[60] and whether "the [private] conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State."[61] This Article contends that state action should be deemed to violate the fourteenth amendment when the state action provides the impetus for private conduct that would violate the fourteenth amendment if undertaken by a state actor. Specifically, state action is the impetus for such private conduct when it amounts to compulsion or encouragement of the private conduct. Although the Court has recognized this principle in some state action decisions,[62] the Court has declined to follow it in several other cases.[63] This inconsistent treatment of the state action doctrine has prompted a great deal of scholarly criticism.[64]

There are four categories of cases in which the combination of action by state and private actors has repeatedly led to confused opinions by the Court. The Court's approach in each category is considered and compared to the approach suggested by this Article. The first category consists of cases in which the state *compelled* private action that would have been unconstitutional if done by a state actor. Such compulsion is obviously state action that violates the fourteenth amendment. The private party who lacks choice should not be held liable for the constitutional violation.

The second category consists of cases in which the state has *encouraged* private action that would be unconstitutional if undertaken by a state actor. This encouragement is similarly unconstitutional.

In the third category of cases, the state has provided some *benefit*, such as a license, a charter, or financial support, to a private party who takes action that a state actor could not (constitutionally) pursue. In such cases, courts should acknowledge that the provision of some governmental benefit is state action and then determine

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59 Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

60 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

61 Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

62 *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

63 *See, e.g.*, cases cited *supra* notes 59-61; Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (fair attribution approach); Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (fair attribution approach).

64 *See, e.g.*, Black, *supra* note 1, at 95 ("The field is a conceptual disaster area."); Chemerinsky, *supra* note 1, at 504-05 ("earlier commentators were . . . successful in demonstrating the incoherence of the state action doctrine"); Glennon & Nowak, *supra* note 1, at 222 ("In three decisions during the 1975 Term, the Justices effectively removed any semblance of meaning from the state action requirement.").

whether that action is constitutional. As long as the benefit is not provided according to some constitutionally impermissible criteria, that state action ordinarily should be deemed constitutional. However, the provision of the benefit may be unconstitutional in certain cases because it amounts to compulsion or encouragement of a private action that would be unconstitutional if undertaken by a state actor.

The fourth category is comprised of cases in which there has been state *inaction* in the face of private conduct that would have violated the fourteenth amendment if done by a state actor. State inaction is the functional equivalent of allowing the private party to engage in the conduct at issue because the state has decided not to interfere with or prohibit it.[65] If the state has no affirmative duty to take some action, state inaction should be considered constitutional unless, in the circumstances of the particular case, it constitutes compulsion or encouragement of the private action that would violate the fourteenth amendment if undertaken by a state actor.

A. Compulsion

The clearest case for applying the standards of the fourteenth amendment is when the state compels private action that would violate the fourteenth amendment if taken by a state actor. The state act of compulsion is the impetus for the private action and ultimately for the deprivation of a constitutional right. In such a case, the conduct of the private party is merely a response to the state compulsion. As a result, the state action, not the private conduct, is unconstitutional. The Court recognized this principle in *Peterson v. City of Greenville*[66] when it overturned the trespass convictions of black youths who refused to leave a lunch counter after being requested to do so by the manager. The state action challenged in *Peterson* was not simply the use of the state's criminal justice system in prosecuting the defendants for trespass, but also a city ordinance that required racial segregation in restaurants.[67] The Court stated that "[w]hen the State has commanded a particular result, it has

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65 *See infra* notes 146-48 and accompanying text.

66 373 U.S. 244 (1963). *Peterson* was one of a group of cases known collectively as "the sit-in cases." They arose from the efforts of civil rights activists during the early 1960s to eliminate racial segregation in restaurants and other places of public accommodation. The facts in the cases were basically the same: black persons, or black and white persons together, were denied service in restaurants and then were arrested for trespass if they refused to leave when requested to do so by the restaurant management. These persons were usually convicted of criminal trespass, and they often challenged their convictions on constitutional grounds. Several of those cases reached the Supreme Court during the 1963 and 1964 terms. *See generally* Lewis, *The Sit-in Cases*, *supra* note 1; Paulsen, *supra* note 1.

67 The ordinance provided:

saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice."[68] The Court held that the trespass convictions in *Peterson* contravened the fourteenth amendment because the restaurant owner was compelled by the ordinance to ask some customers to leave. The customers' refusal to leave after that request became the basis for their trespass convictions.[69]

A statutory command is not the only type of state action that could amount to compulsion. An order from a state court directing a private party to take an action that the fourteenth amendment would prohibit a state actor from taking would also be unconstitutional under this approach. Likewise, a command or threat of sanctions from a state executive official would constitute state compulsion. In *Lombard v. Louisiana*,[70] a trespass case decided on the same day as *Peterson*, the Court determined that a public statement from the mayor of New Orleans that " 'no additional sit-in demonstrations . . . will be permitted' "[71] was an "official command . . . to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance."[72] The Court reversed the trespass convictions in *Lombard* by employing the same analysis it had used in *Peterson*: the restaurant owner was

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> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> (b) Separate tables, counters or booths;
>
> (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> (d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;
>
> (e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

GREENVILLE, S.C. CODE § 31-8 (1953, as amended in 1958), *quoted in Peterson*, 373 U.S. at 246-47.

68 *Peterson*, 373 U.S. at 248 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

69 *Id.* at 247-48.

70 373 U.S. 267 (1963).

71 *Id.* at 271.

72 *Id.* at 273. The Court stated that "the city must be treated exactly as if it had an ordinance" requiring racial segregation in restaurants because the mayor's "official command . . . has at least as much coercive effect as an ordinance." *Id.*

compelled by the mayor's directive to ask certain customers to leave, which led to the trespass charges and convictions.[73]

One may question whether this compulsion analysis would yield a different result if the state could establish that the private action was not motivated by the state command. The state in *Peterson* contended that the trespass convictions should be affirmed because "the manager [of the lunch counter] would have acted as he did independently of the existence of the ordinance."[74] The Court rejected this argument:

> When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.[75]

The Court's treatment of this issue does not go far enough. The logical conclusion of *Peterson* is that only the state actor, and not the private party, should be held liable for the constitutional violation that resulted from the state compulsion. When the state compels a private party to discriminate against members of a racial minority, it is the state action, not the private conduct, which is unconstitutional. The state compulsion is unconstitutional even if no private party actually obeys.[76]

The Court has not, however, followed the compulsion principle to its logical conclusion. The Court was not faced with the issue of allocating liability in *Peterson* or *Lombard* because those cases were challenges to the victims' trespass convictions rather than civil suits for damages. The Court confronted the issue seven years later in a civil rights suit concerning state compulsion of private racial segregation. In *Adickes v. S.H. Kress & Co.*,[77] a white plaintiff alleged that she was denied service at a lunch counter in a store owned by S.H. Kress and Company because she was accompanied by black persons. She sued Kress for damages under section 1983.[78] The Court reaffirmed the holdings of *Peterson* and *Lombard*: " 'the State may not use race or color as the basis for distinction. *It may not do so by direct action or through the medium of others who are under State compulsion to do*

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73 *Id.* at 272-74.

74 *Peterson*, 373 U.S. at 248.

75 *Id.*

76 This is analogous to the analysis used when a statute is challenged as unconstitutional on its face.

77 398 U.S. 144 (1970).

78 42 U.S.C. § 1983 (1982).

so.' "[79] The Court also recognized in *Adickes* that compulsion may take the form of "a custom having the force of law,"[80] and that such a custom may be proved in various ways.[81]

The Court's analysis in *Adickes* was problematic because it failed to identify correctly the party responsible for the constitutional violation. As noted above, the plaintiff in *Adickes* sued the private store owner, not the state, under section 1983. The Court initially stated that, "[f]or [the plaintiff] to recover . . . she must show a deprivation of a right gnaranteed to her by the Equal Protection Clause of the Fourteenth Amendment."[82] The Court then described the question raised by *Adickes*:

> [W]e must decide, for purposes of this case, the following "state action" issue: Is there sufficient state action to prove a violation of [the plaintiff's] Fourteenth Amendment rights if she shows that Kress refused her service because of a state-enforced custom *compelling* segregation of the races in Hattiesburg restaurants?[83]

The Court concluded that the plaintiff "will have made out a claim under section 1983 for violation of her equal protection rights if she proves that she was refused service by Kress because of a state-enforced custom *requiring* racial segregation in Hattiesburg restaurants."[84]

To suggest that the plaintiff could prevail in her action for dam-

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79 *Adickes*, 398 U.S. at 171 (quoting Baldwin v. Morgan, 287 F.2d 750, 756 (5th Cir. 1961) (emphasis added by the Supreme Court)).

80 *Id.*

81 *Id.* at 171-72. The trial court had assumed that the only way to prove that a custom had the force of law was with evidence that it had been enforced by use of the state's criminal trespass statute. The Supreme Court disagreed, and suggested other possible methods of proof:

> [P]etitioner may be able to show that the police subjected her to false arrest for vagrancy for the purpose of harassing and punishing her for attempting to eat with black people. Alternatively, it might be shown on remand that the Hattiesburg police would intentionally tolerate violence or threats of violence directed toward those who violated the practice of segregating the races at restaurants.

Id. (footnote omitted). The Supreme Court also rejected the district court's position that the plaintiff would have to show that this custom of segregation was in force throughout the state: "In the same way that a law whose source is a town ordinance can offend the Fourteenth Amendment even though it has less than state-wide application, so too can a custom with the force of law in a political subdivision of a State offend the Fourteenth Amendment even though it lacks state-wide application." *Id.* at 173.

82 *Id.* at 169.

83 *Id.* (emphasis added). One might read the facts in *Adickes*, as recounted by the Supreme Court, as indicating that the Kress manager made the decision not to serve the plaintiff and that the state enforced that decision by subsequently arresting the plaintiff for vagrancy. The Court, however, as the quoted passage demonstrates, read the substantive count of the plaintiff's complaint as alleging that she was denied service because of a state-enforced custom mandating racial segregation in restaurants.

84 *Id.* at 148 (emphasis added).

ages against Kress, a private party, if she could establish that Kress was compelled by the state to maintain segregated lunch counters is inconsistent with the compulsion principle of *Peterson*. After all, why should a private party who has been *compelled* to take some action by the state be liable for the resulting harm? The Court acknowledged in *Peterson* that, when the state compels a private party to take some action, the state "has removed that decision from the sphere of private choice."[85] This principle should have led the Court to conclude that the state, and not the private party, should be liable for the constitutional violation that it has compelled. This approach to compulsion cases would obviously limit a plaintiff's opportunity to recover damages for a constitutional violation caused by a private party who was compelled by the state,[86] but a private party in such a case "is left with no choice of his own"[87] and consequently should not be deemed liable. Thus, separating state action from private conduct is important, not only to determine whether a violation of the fourteenth amendment has occurred, but also to allocate liability properly.

B. Encouragement

Although state compulsion is the most obvious way for a state to affect private conduct, state encouragement may also provide the impetus for private action. Just as a state cannot compel private parties to engage in conduct that would be unconstitutional if engaged in by a state actor, neither should it be permitted to encourage such conduct by private parties. When the challenged state action constitutes encouragement of private action that a state actor could not take, the state action is unconstitutional and the state, not the private party, is responsible for the deprivation of the victim's constitutional rights.

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85 Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).

86 A plaintiff could not recover damages in a suit against a state or a state official acting in his official capacity for deprivation of a constitutional right, *see* Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."), unless Congress abrogated the states' immunity using its power under section 5 of the fourteenth amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). As the law stands now, a plaintiff may sue state actors in their individual capacities for damages, although they generally do not have deep pockets and may be protected by official immunity. *See, e.g.*, Malley v. Briggs, 475 U.S. 335 (1986); Scheuer v. Rhodes, 416 U.S. 232 (1974). A plaintiff may also be able to bring an action under state law against the private party or the state actors.

87 *Peterson*, 373 U.S. at 248.

In *Reitman v. Mulkey*,[88] the Supreme Court applied the encouragement rationale.[89] *Reitman* involved a challenge to an amendment to the California constitution, commonly known as Proposition 14, which gave a property owner the right " 'to decline to sell, lease or rent' " his property to anyone " 'as he, in his absolute discretion, chooses.' "[90] This constitutional amendment, which was approved by the voters in a statewide referendum, effectively repealed a California fair housing statute[91] and narrowed the scope of a broad equal rights law.[92] The United States Supreme Court agreed with the California Supreme Court that Proposition 14 "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment."[93] The Court concluded that Proposition 14 was more than "a mere repeal of"[94] existing statutes:

> Private discriminations in housing were now not only free from [the anti-discrimination statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of

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88 387 U.S. 369 (1967).

89 The Court decided one other case, Robinson v. Florida, 378 U.S. 153 (1964), using an encouragement rationale. This case is discussed *infra* at notes 98-105 and accompanying text.

90 *Reitman*, 387 U.S. at 371 (quoting CAL. CONST. art. I, § 26). The main substantive provision of Proposition 14 read:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Id.

91 The Rumford Fair Housing Act made it unlawful for the owner of any housing unit with more than four units "to refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodation because of the race, color, religion, national origin or ancestry of such person or person." CAL. HEALTH & SAFETY CODE § 35,720 (West 1967) (repealed 1980, now covered by CAL. GOV'T CODE § 12,955). The statute also prohibited discrimination in the terms or conditions of housing or the provision of facilities or services in connection with housing. *Id.*

92 The Unruh Act provided:

> All persons within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Reitman, 387 U.S. at 372 n.3 (quoting CAL. CIV. CODE § 51). The statute was amended in 1961 to include sex as a prohibited basis for discrimination, CAL. CIV. CODE § 51 (West Supp. 1982), and was amended again in 1987 to prohibit discrimination on the basis of "blindness or other physicial disability." CAL. CIV. CODE § 51 (West Supp. 1989).

93 *Reitman*, 387 U.S. at 376.

94 *Id.*

> the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.[95]

The *Reitman* decision is based on the principle that a state may not pursue indirectly, through encouragement of private action, a policy that the state could not constitutionally pursue directly.[96] In *Reitman*, the state had departed from neutrality by encouraging private property owners to discriminate on the basis of race. The encouragement took the form of Proposition 14, which sent a message to the people of California that, if they chose to discriminate on the basis of race in renting or selling their property, they would have the protection of the state in implementing that choice. The state's decision to articulate that message in a constitutional amendment differs significantly from a state decision merely not to prohibit private race discrimination in the housing market. The legal effect in the two situations is the same (*i.e.*, that private property owners will be able to discriminate on the basis of race in selling or renting their property). But the state action involved is not. Enshrining the right of private property owners to engage in race discrimination in a constitutional amendment is a departure from neutrality; declining to prohibit race discrimination is not. In the latter case, an owner's decision to discriminate on the basis of race would be private and not influenced by a signal from the state that such discrimination is protected under the state constitution.[97]

The Court also applied the encouragement rationale in *Robinson v. Florida*,[98] a sit-in case[99] decided after *Peterson*.[100] In *Robinson*, the

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95 *Id.* at 377.

96 The Court made a similar statement about compulsion in *Adickes*. *See supra* text accompanying note 79.

97 An alternative approach to the one suggested above would be to treat both kinds of state action—creating a right to discriminate and not prohibiting discrimination—as the same since the legal effect is the same; in both situations, the private party may lawfully engage in the conduct. In his dissenting opinion in *Reitman*, Justice Harlan recognized this possibility: "Every act of private discrimination is either forbidden by state law or permitted by it. There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent 'encourages' those who wish to discriminate to do so." *Reitman*, 387 U.S. at 394 (Harlan, J., dissenting). If both types of state action were considered unconstitutional, then states would have a duty to prohibit all private action that state actors could not constitutionally undertake. This result is consistent with the approach of scholars who have advocated the abolition of the state action requirement, but, as noted in Part I of this Article, that approach would effectively eliminate the distinction between the public and private spheres preserved in the fourteenth amendment. *See supra* text accompanying notes 39-57.

98 378 U.S. 153 (1964).

99 *See supra* note 66.

100 *See supra* notes 66-69 and accompanying text.

defendants were arrested after refusing to leave a restaurant in which they were denied service because of their race.[101] In *Robinson*, unlike *Peterson*, no state statute, ordinance, or regulation required racial segregation in restaurants.[102] The Court in *Robinson* nevertheless found unconstitutional state action in the form of a state health regulation[103] and a state-issued manual on "Food and Drink Services" that required separate facilities for each race.[104] The Court concluded: "While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together."[105] Although the Court did not explicitly say so, a fair reading of its decision is that the state policy was unconstitutional because it encouraged racial segregation in restaurants by discouraging integration.

Despite the *Reitman* and *Robinson* precedents, the Court has not applied the encouragement rationale to other cases in which it would have been appropriate. For example, application of the encouragement rationale would have led to a different analysis in *Flagg Bros. v. Brooks*.[106] In that case, Mrs. Brooks alleged that Flagg Brothers, a private storage company, intended to deprive her of her property without due process. Her belongings had been stored by Flagg Brothers[107] and, when she failed to pay the storage charges, Flagg Brothers threatened to sell her furniture pursuant to a provision of the Uniform Commercial Code enacted in New York which permitted such a sale without a hearing.[108] The Supreme Court found that the case involved private, not state action, because the state "permit[ted] but [did] not compel" Flagg Brothers to sell the goods.[109]

The U.C.C. provision at issue in *Flagg Bros.* is clearly state action under the definition suggested in Part I above. That state action is unconstitutional under the encouragement approach because it sent

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101 "At the trial, the . . . management explained that, while Negroes were welcomed as customers in the store's other departments, serving Negroes in the restaurant would be 'very detrimental to our business' because of the objections of white customers." *Robinson*, 378 U.S at 154.

102 *See id.* at 156.

103 According to the Court, the regulation required separate restrooms " 'where colored persons are employed or accommodated.' " *Id.* (quoting FLA. SANITARY CODE, c. VII, § 6).

104 *See id.*

105 *Id.*

106 436 U.S. 149 (1978).

107 Mrs. Brooks had been evicted from her apartment, and the city marshall had contacted Flagg Brothers to pick up and store her possessions. *Id.* at 153.

108 N.Y. U.C.C. LAW § 7-210 (McKinney 1964) (amended 1982), *quoted in Flagg Bros.*, 436 U.S. at 151 n.1.

109 *Flagg Bros.*, 436 U.S. at 165.

the same message to storage companies in New York as Proposition 14 sent to those who wished to discriminate on the basis of race in housing in California: if you choose to engage in this sort of conduct, you will have the approval and the protection of the state. The effect is also the same—to encourage private parties to engage in conduct that would be unconstitutional if committed by a state actor.[110] If a state wishes to approve a procedure whereby storage companies may sell goods to recover storage charges due from the owner, that procedure must comport with the due process clause. Though the U.C.C. provision should have been held unconstitutional under the encouragement approach, Flagg Brothers should not have been held liable for damages. It was the state action, in the form of the statute, which was responsible for the violation of Mrs. Brooks's due process right. Flagg Brothers, the private party, merely responded to the state's message of encouragement. Mrs. Brooks should have been entitled only to a declaration that the statute was unconstitutional.

In rejecting the encouragement rationale, the Court in *Flagg Bros.* stated that:

> If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[111]

The Court correctly recognized that a judicial decision is just as much a state action as is a statute. The real issue is whether such a court decision is constitutional, and *Reitman* says that state action that encourages private conduct is unconstitutional if the same action committed by a state actor would violate the Constitution.

The hypothetical court decision would be unconstitutional if it constituted encouragement. The Court in *Reitman*, however, recognized a difference between "the mere repeal" of the fair housing statute and encouragement of private racial discrimination in hous-

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110 This analysis assumes that the procedure authorized in U.C.C. § 7-210 would violate the due process clause if it authorized the state to sell stored goods without providing an opportunity for the owner to be heard. The Supreme Court made the same assumption in *Flagg Bros.* *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 254 (1985).

111 *Flagg Bros.*, 436 U.S. at 165.

ing.[112] By the same token, a significant difference exists between not prohibiting self-help remedies and creating a right for storage companies to use such remedies. Assume, as the Court in *Flagg Bros.* hypothesized, that the state had not enacted U.C.C. section 2-710 and that Flagg Brothers threatened to sell Mrs. Brooks's furniture. If Mrs. Brooks had sued Flagg Brothers in state court, the court might have held that the sale did not amount to conversion under state law and was not prohibited by any other state law. Such a decision would be analogous to the "mere repeal" of prior statutes discussed in *Reitman*. The legal effect of the court decision and the repeal of the fair housing law would be the same: the private action would not be deemed illegal and therefore could continue. The state has remained neutral by refusing to take a position; private parties may decide to engage in the action or not, and the state will not interfere with the decision.

In the alternative, if the state court had declared that a common-law rule gave storage companies the *right* to sell stored goods to recover unpaid storage charges without an opportunity for the owner to be heard, that decision would be analogous to the encouragement of Proposition 14. In such a case, the state has departed from neutrality by guaranteeing the warehouser the right to sell the debtor's property without a hearing. The private storage companies then "need no longer rely solely on their personal choice. They could now invoke express [state] authority . . . ."[113]

The difference between a state court denying relief to Mrs. Brooks and announcing a common-law right for warehousers to sell stored goods without a hearing is like the difference between a "mere repeal" of a fair housing law and Proposition 14 in *Reitman*. The message sent by the state is not the same. When the state legislature repeals a statute, or a state court denies relief to a plaintiff, the state may be seen as declining to take a position on the private action at issue; the state is merely refusing to prohibit the private action, but it is not willing to take the additional step of promoting the private action either. The state sends an entirely different message when it guarantees, through a statute, a constitutional provision, or the common law, the *right* to engage in the private action. The message sent to private parties then is not, "do what you want, the state will not interfere," but rather, "go ahead, the state is behind you, and if anyone challenges your action, the state will support and protect your right to engage in that action."

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112 Robinson v. Florida, 387 U.S. 369, 376-77 (1967).

113 *Id.* at 377. Whether or not some particular state action constitutes encouragement will be in some cases a close factual question. That line-drawing may be difficult, however, does not mean that courts should decline to do it.

Application of the encouragement analysis to the facts of *Lugar v. Edmondson Oil Co.*[114] would have altered the analysis in that case as well. Lugar owed money to one of his suppliers, Edmondson Oil Company. Edmondson sued on the debt in state court and requested the state court to attach some of Lugar's property prior to judgment in the case. The state prejudgment attachment procedure "required only that Edmondson allege, in an *ex parte* petition, a belief that [Lugar] was disposing of or might dispose of his property in order to defeat his creditors."[115] The clerk of the state court issued a writ of attachment and the sheriff executed it.[116] Lugar then sued Edmondson under section 1983 for deprivation of his property without due process.

The Supreme Court adopted an artificial and needlessly confusing approach to resolving the state action issue. The *Lugar* Court characterized the issue as whether "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State."[117] *Lugar*, like all of the state action cases, involved both state and private action. The question the Court should have addressed in *Lugar* was whether the state action constituted encouragement of private action that would violate the due process clause if taken by a state actor. The answer, on the facts of *Lugar*, is yes. Like Proposition 14 in *Reitman* and the U.C.C. provision in *Flagg Bros.*, the state's prejudgment attachment procedure sent a message to private parties. In *Lugar*, the message from the state to private creditors was, if you want to attach a debtor's property before judgment without a prior hearing and without any showing that the debtor might be alienating property to defeat creditors' claims, the state will help you. That state imprimatur encouraged private parties to utilize an attachment procedure that did not comport with due process principles. The issue is not whether the private action is "fairly attributable" to the state but whether the state action itself is unconstitutional.

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114 457 U.S. 922 (1982).

115 *Id.* at 924.

116 The attachment order was subsequently vacated by the state court after a hearing at which the court determined that Edmondson had failed to establish that Lugar was or might be disposing of his property to defeat claims of his creditors. *See id.* at 925.

117 *Id.* at 937. The Court went on to state its "two-part approach to this question of 'fair attribution' ":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id.

The Court in *Lugar* held that the debtor-plaintiff could maintain his section 1983 claim against the private creditor for deprivation of his property without due process. Under the proposed analysis, that is the wrong result. The state statute that approved the procedure for prejudgment attachment provided the impetus for the creditor's actions. This state action amounts to encouragement of private action that would, if taken by a state actor, be a violation of the due process clause. The state action, therefore, and not the action of the private creditor, violated the fourteenth amendment. Thus the state, not the private creditor, should be held responsible for the deprivation of the debtor's property without due process of law.

C. Benefits

State action also intersects with private conduct when the state provides some sort of benefit to a private party. A benefit may take several forms, including a tax exemption, a license, or financial support. When the state grants a benefit to a private party who engages in conduct that would violate the Constitution if committed by a state actor, the provision of the benefit is unquestionably state action. As long as the state did not use constitutionally impermissible criteria in deciding who would receive the benefit,[118] granting the benefit is not unconstitutional state action unless it amounts to compulsion or encouragement of the private conduct.[119]

The Supreme Court considered the state action implications of granting a state benefit in *Moose Lodge No. 107 v. Irvis*.[120] The constitution of the Moose Lodge restricted membership to white males,[121] and the Lodge allowed members to invite only white guests to Lodge functions.[122] The Moose Lodge chapter in Harrisburg ob-

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118 The state could not, for example, give some state license or benefit only to white applicants. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

119 Whether the state's provision of a benefit to a private party constitutes encouragement of private action that would be unconstitutional if taken by a state actor will often depend on the circumstances. In some cases, only a fine line may separate the mere provision of a benefit on the one hand and encouragement on the other. For example, the provision of a benefit accompanied by "a wink and a nod" from a state official might amount to encouragement.

120 407 U.S. 163 (1972).

121 The Lodge also discriminated on other grounds, as is indicated in the excerpt from its constitution quoted by Justice Douglas in his dissenting opinion:

> "The membership of lodges sball be composed of male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of any other than the Caucasian or White race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being."

Id. at 181 (Douglas, J., dissenting) (quoting the Moose Lodge Constitution).

122 The Lodge originally had no explicit racial component to its policy on guests, but the Supreme Court noted that "the bylaws of the Supreme Lodge ha[d] been altered

tained a liquor license from the state of Pennsylvania. In order to retain the license, a licensee must comply with the regulations of the state Liquor Control Board, including one that required that " '[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws.' "[123] The Court concluded that enforcement of the regulation should be enjoined "insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions."[124] Justice Douglas accurately characterized the state's issuance of the liquor license on the condition that the licensee comply with the regulation as state compulsion of race discrimination by the Moose Lodge.[125]

The Court in *Moose Lodge* also decided a second and more difficult issue. The plaintiff contended that the state's grant of the liquor license turned the Moose Lodge policy of racial discrimination into an unconstitutional state action. The Supreme Court rejected this argument, despite the fact that the grant of the license by the state Liquor Control Board plainly was a state action. The majority's holding turned on a different point, however; it correctly held that the discrimination was private in nature. Granting a liquor license to a private club with racially discriminatory membership and guest policies was not unconstitutional state action, at least in the absence of the regulation that compelled compliance with the licensee's constitution and by-laws.[126] Justice Rehnquist, writing for the majority, noted that, with the exception of the one invalid regulation, "there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination."[127] Additionally, he found, again excepting the unenforceable regulation, that "the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club that it licenses to serve liquor."[128]

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since the lower court decision to make applicable to guests the same sort of racial restrictions as are presently applicable to members." *Id.* at 178.

123 *Id.* at 177 (quoting Regulations of the Pennsylvania Liquor Control Board § 113.09 (June 1970 ed.)).

124 *Id.* at 179.

125 *Id.* at 181 (Douglas, J., dissenting). He quoted a statement from *Adickes*: " 'a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.' " *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)). Justice Douglas also cited *Peterson*. *Id.*

126 The majority invalidated the regulation that required licensees to comply with their own constitution and by-laws, *id.* at 179, but considered separately the constitutionality of the granting of the liquor license to the Moose Lodge. *Id.* at 177.

127 *Id.* at 173.

128 *Id.* at 175 (footnote omitted).

The Supreme Court in *Public Utilities Commission v. Pollak*[129] considered another challenge to a state licensing and regulatory scheme due to objectionable conduct by a licensee. Congress had granted a franchise to a private transit company to operate buses and streetcars in the District of Columbia and provided that the transit company be regulated by the Public Utilities Commission for the District of Columbia. The transit company had radio speakers installed in its buses and streetcars and arranged for a local radio station to transmit programs. A few passengers complained that the radio programs interfered with their ability to converse. The Commission investigated, but determined that the radio programming did not impair " 'public comfort and convenience.' "[130] The complaining passengers, alleging that the radio broadcasts violated the first amendment, subsequently sued the Commission. The Supreme Court found that the first amendment was triggered because of the "sufficiently close relation between the Federal Government and the radio service."[131] The Court mentioned some factors in support of its conclusion that the state action requirement was satisfied, including the Commission's "regulatory supervision" of the transit company and the Commission's investigation of the radio policy.[132] The Court then decided that the radio broadcasts on the buses and streetcars did not violate the first amendment.[133]

Application of the proposed compulsion/encouragement analysis in *Pollak* would have achieved the same result but by a different route. The grant of the franchise, the regulation by the Commission, and the investigation of the radio programming all constitute state action under the definition suggested in Part I. The question the Court should have asked was whether those actions were unconstitutional; that is, did any of those acts, either individually or in combination, amount to compulsion or encouragement of action by the transit company that would have been unconstitutional if done by a state actor? The answer would have been "no" for two reasons. First, the state action of granting a franchise did not compel or encourage the private transit company to broadcast the radio programs on the buses. Second, even if the state had compelled or encouraged the radio broadcasts, the transit company's playing the radio programs on the buses did not violate the first amendment because it would not have been unconstitutional for a state-owned transit company to broadcast radio programs on buses.[134] Under

129 343 U.S. 451 (1952).
130 *Id.* at 459.
131 *Id.* at 462.
132 *Id.*
133 *Id.* at 463.
134 The Court reached essentially that conclusion when it decided that the first

the approach advocated by this Article, state compulsion or encouragement of private conduct does not violate the Constitution if the conduct would not be unconstitutional if undertaken by a state actor.

The state action of granting a license to a private party is not unconstitutional merely because the licensee engages in conduct that would violate the Constitution if done by a state actor.[135] Where the licensing is not the equivalent of compelling or encouraging a private party to take a course of action that would be unconstitutional if taken by a state actor, the impetus for the conduct of the private party does not come from the state, and the state is not responsible for it. In such a situation, the grant of a license is state action which is constitutional, and the acts of the private party, however distasteful, are private acts for which the state is not responsible and which consequently are not prohibited by the fourteenth amendment.[136]

Financial assistance from the state is another type of benefit. Under the definition of state action proposed in Part I, the state acts when it provides such financial assistance to a private party. As long as the financial benefit is not provided according to constitutionally impermissible criteria,[137] the state action of providing a financial benefit to a private party who engages in conduct that would be unconstitutional for a state actor to engage in is constitutional, unless the provision of the financial benefit constitutes compulsion or encouragement of that private action. The facts of *Rendell-Baker v. Kohn*[138] illustrate this principle. A private high school for students with special needs discharged several teachers from their jobs. The school received almost all of its operating funds from governmental

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amendment applied to the transit company's policy of playing radio programs on its buses and streetcars but that such policy did not violate the first amendment. *See id.* at 462-63.

135 Justice Rehnquist stated in *Moose Lodge* that "the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." *Moose Lodge*, 407 U.S. at 177. The holding might be better stated, under the approach advocated here, as: The operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board is state action, but it does not violate the equal protection clause of the fourteenth amendment. The discriminatory guest policy of the Moose Lodge is not state action, nor was it compelled or encouraged by state action, and therefore it is not prohibited by the fourteenth amendment.

136 Private acts may, of course, be prohibited by federal or state statutes. For example, a state could require, as a condition of being granted a liquor license, that licensees adhere to a nondiscriminatory policy in serving guests.

137 For example, the state could not decide to give financial aid on the basis of race without a compelling justification. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

138 457 U.S. 830 (1982).

sources.[139] The provision of the some of the funds was conditioned on compliance with state regulations.[140] In their section 1983 suit against the school, the teachers alleged that they were discharged for expressing their views in violation of the first, fifth, and fourteenth amendments.[141] The Court stated: "The core issue presented in this case is not whether petitioners were discharged because of their speech or without adequate procedural protections, but whether the school's action in discharging them can fairly be seen as state action."[142] The Court examined a number of factors[143] and concluded that the state action requirement was not satisfied because "the discharge decisions of the New Perspectives School [were not] fairly attributable to the State."[144]

The Court's analysis in *Rendell-Baker* is flawed. Governmental funding and regulation are obviously state actions. The Court should have conceded this and then considered whether those actions violated the Constitution. Because neither the funding nor the regulation amounted to compulsion or even encouragement of the discharges by the private school,[145] the state actions were not unconstitutional. Thus, the discharges were the result of a private decision for which the state was not responsible.

As with licensing, the state action of providing some financial benefit to a private party does not become unconstitutional merely because the recipient takes action that a state actor could not (constitutionally) take. The state is not responsible for that private action unless the state action provided the impetus for it by compelling or encouraging it. If, on the facts of a particular case, the provision of a benefit is the equivalent of compelling or encouraging such private action, then the private party should not be held liable for the constitutional violation.

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139 Massachusetts law required local schools to educate students with special needs but permitted the schools to pay tuition for special-needs students at an appropriate private school if the school did not have a suitable program of its own. Many of the students at the high school involved in the *Rendell-Baker* case had been referred by local schools. *See id.* at 832 & n.1. The school also received money from state and federal agencies. *See id.* at 832. According to the Court, "[i]n recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school's operating budget." *Id.*

140 *See id.* at 833.

141 *Id.* at 835.

142 *Id.* at 838 (footnote omitted).

143 The Court considered the governmental funding and the governmental regulation, among other factors. *See id.* at 840-41.

144 *Id.* at 840.

145 The Court found specifically that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." *Id.* at 841. Although the Court did not say so, the same was true of the funding.

D. Inaction

Yet another difficult area of constitutional adjudication in which state action intersects with private conduct is acquiescence or inaction by state actors in the face of conduct by private parties that state actors could not (constitutionally) undertake. Such acquiescence or deliberate inaction by a state or a state actor would also be state action under the approach proposed here. Justice Harlan once suggested that every act that is not prohibited by state law is permitted by state law.[146] Professor Brest pointed out, from a positivist perspective, that "any private action acquiesced in by the state can be seen to derive its power from the state."[147] Identifying acquiescence or conscious inaction as state action does not mean, however, that the private conduct acquiesced in is subject to constitutional review. Only state action, or in this case state inaction, triggers review under the fourteenth amendment. Conscious state inaction[148] effectively allows the performance of private acts that are not prohibited. As long as the state actor had no duty to act, conscious state inaction should not be considered unconstitutional. Nonetheless, inaction that amounts to encouragement of private action that would violate the fourteenth amendment if taken by a state actor would be unconstitutional.

The Supreme Court has sometimes found that a state actor has an affirmative duty to interfere with or prohibit particular private action. Professors Stone, Seidman, Sunstein, and Tushnet have suggested[149] that *Burton v. Wilmington Parking Authority*[150] is such a case. The Parking Authority, an agency created by state statute to provide parking facilities for the public, built a parking garage in downtown Wilmington, Delaware. The Authority decided to lease some of the space in the parking garage building to help pay for the garage.

Subsequently, the Eagle Coffee Shoppe, one of the lessees, refused to serve a black customer who, in turn, brought suit in state court against Eagle and the Parking Authority. The Supreme Court

146 Reitman v. Mulkey, 387 U.S. 369, 394 (1967) (Harlan, J., dissenting).

147 Brest, *supra* note 1, at 1301.

148 When state inaction is not conscious or deliberate, as when no state actor knows of a particular course of conduct by private parties, state inaction should not be considered state action. A state actor "acts" when she decides to do nothing to interfere with or prohibit some private activity, but a state actor is not "acting," in the ordinary sense of the word, when she is unaware of the private action. This distinction between conscious inaction and unknowing inaction does not, however, have any effect on the determination on the merits. If a state actor does nothing to prohibit a private activity because the state actor is not aware of it, that inaction obviously could not be considered state compulsion or encouragement of the activity.

149 G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 6, at 1503.

150 365 U.S. 715 (1961).

held that "when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."[151] The Court effectively imposed a duty on the state to include an anti-discrimination provision in leases of public property.[152] The Court in *Burton* should have addressed its order to the state agency, the Parking Authority, because the equal protection clause applies only to state action and the discrimination by Eagle was private action. The holding then would have been phrased more clearly in terms of a duty owed by the state: when a state leases public property in the manner and for the purpose shown to have been the case here, the state must require the lessee to comply with the terms of the fourteenth amendment.

The majority in *Burton* did not clearly articulate exactly which factors triggered the state's obligation to prohibit private racial discrimination when the state usually has no such duty.[153] Justice Clark's opinion for the majority, however, mentioned several relevant factors, noting that "[t]he land and building were publicly owned,"[154] the state paid for maintenance and repairs,[155] "the commercially leased areas . . . constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit,"[156] and that Eagle benefitted from the garage as a source of convenient parking.[157] The Court noted particularly that, "in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, . . . profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a government agency."[158] Ar-

151 *Id.* at 726.

152 The Delaware Chancery Court in *Burton* suggested that the state could have included such a provision in its lease with Eagle. *See id.* at 725.

153 The majority stated that "readily applicable formulae may not be fashioned" and suggested that its conclusion was based on the particular "facts and circumstances of this record." *Id.* The majority opinion in *Burton* also contains the often-quoted language, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722.

154 *Id.* at 723.

155 *Id.* at 724.

156 *Id.* at 723-24. Prior to construction, experts had advised the Authority that projected revenues from parking would not be enough to pay the debt incurred to finance the facility. *Id.* at 719.

157 *Id.* at 724.

158 *Id.* The majority also indicated that the Parking Authority "located at appropriate places [on the building] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags." *Id.* at 720. As Professors Stone, Seidman, Sunstein, and Tushnet observed, however, the presence of state symbols does not explain why the Court found that the state had a duty to prohibit Eagle from adhering to a policy of racial discrimination:

guably, the two most important factors were the "symbiotic relationship"[159] between the Parking Authority and Eagle, and the fact that the private racial discrimination occurred in a publicly owned building. The Court has not subsequently used the *Burton* symbiotic relationship test to impose a duty on the state to interfere with or prohibit private conduct.[160]

Absent any state duty to prohibit or interfere with private action, state acquiescence or conscious inaction should be deemed constitutional unless it amounts to compulsion or encouragement, which would be unlikely. Recall the hypothetical case posited by the Supreme Court in *Flagg Bros.*:[161] in the absence of relevant statutory authorization, Flagg Brothers threatens to sell Mrs. Brooks's furni-

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> If Eagle's presence in the building subtly communicates state approval of its policies, this must be because we believe that in this context the state has an affirmative obligation to control policies of which it disapproves. But even if this were true, we would still be faced with the task of explaining what it is about this context that triggers this obligation.

G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 6, at 1507.

159 This is how the Court in subsequent opinions characterized the relationship between the Parking Authority and Eagle. *E.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

160 The decisions of the Supreme Court in the public function cases might also be interpreted as imposing a duty on a state actor to regulate private conduct. In Terry v. Adams, 345 U.S. 461 (1953), the Court found a violation of the fifteenth amendment when a private political party (the Jaybird Party) permitted only white persons to vote in its pre-Democratic primary elections. Although there was no majority opinion, Justice Black, writing for himself and two other Justices, noted that, for the past fifty years, the winner of the Jaybird election had almost always won both the subsequent Democratic primary and the general election. Justice Black concluded: "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment." *Id.* at 469 (opinion of Black, J.). And Justice Clark, in a concurring opinion joined by three fellow Justices, stated that, "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." *Id.* at 484 (Clark, J., concurring). Like *Burton*, the holding in *Terry* could have been phrased in terms of a duty to act: if a state permits a private political party to hold the only, for all practical purposes, primary election, the state must require that party to conduct the election in a nondiscriminatory manner in compliance with the fifteenth amendment. In Marsh v. Alabama, 326 U.S. 501 (1946), the Court held that regulations promulgated by the company-owned town of Chickasaw, Alabama violated the first amendment. Alternatively, the Court could have held that the state, which had sanctioned the company's ownership of the town, was responsible for ensuring town compliance with the first amendment.

In addition, the courts have found in a number of section 1983 cases that state actors have a duty to act. *See, e.g.*, Littlefield v. Deland, 641 F.2d 729, 732 (10th Cir. 1981) (county liable for "failure of its Commissioners adequately to fund, or oversee the general policies of, the county jail"); Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir.) ("where senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the superior's inaction amounts to deliberate indifference or tacit authorization of the offensive acts"), *cert. denied*, 449 U.S. 1016 (1980).

161 *See supra* text accompanying note 111.

ture. She files suit against the company in state court. If the state court denies her relief on the ground that no state law prohibits the sale, the state court has acted, but that state action is not unconstitutional. In this hypothetical case, the state has decided not to take a position regarding the lack of a hearing before a warehouser may sell stored goods to recover unpaid storage charges. The state has no duty to prohibit the sale or to require a hearing. Thus, although the state has permitted the private action, the impetus for it has come from the private party and is based on private motivation. In such a case, the state should not be responsible for the private action.

III

Judicial treatment of the state action issue in cases in which the government is asked to enforce the wishes of private parties poses analytical problems related to those raised by the compulsion/encouragement cases discussed in the previous section. These cases generally fall into three categories. In the first, the state court applies common law or statutory rules to a dispute between private parties. For example, if private parties enter into a contract and one party fails to perform, the other party will sue, seeking a state court judgment awarding either equitable relief[162] or damages.[163] The second category concerns wills and trusts. A testator or settlor writes a will or trust, and a state court is asked later to enforce the provisions.[164] In the third category of cases, a private property owner asks the police to enforce the owner's desire to force an uninvited guest off the property.[165] The courts have often addressed these cases in a confused and inconsistent manner. Future cases could be better resolved by asking whether the state, in enforcing the wishes of private parties, is required to draw lines or take other actions that violate the Constitution. The state should not be permitted to defer to the wishes of private parties to avoid constitutional limitations on state action. State action that violates the Constitution is no more justifiable when the motivation for the action comes from private parties than it is when the motivation for the action comes from state actors.

Shelley v. Kraemer[166] is, of course, the leading case in this group.

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162 *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948), discussed *infra* at notes 166-71 and accompanying text.

163 *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953), discussed *infra* at notes 180-85 and accompanying text; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955), discussed *infra* at notes 186-94 and accompanying text.

164 *See infra* notes 196-202 and accompanying text.

165 *See infra* notes 203-08 and accompanying text.

166 334 U.S. 1 (1948). The facts of the case are well known. A group of property

It is also perhaps the easiest case to analyze under the approach suggested here. In *Shelley*, the order of the Missouri Supreme Court sustaining the enforcement of the racially restrictive covenant was plainly state action.[167] The Missouri court directed the trial court to enter judgment for the neighboring property owners (the plaintiffs in the original suit) and to divest the Shelleys, the black purchasers, of their title to the property.[168] That state action violated the equal protection clause of the fourteenth amendment because it was a decision based explicitly on race. In ordering the enforcement of the covenant, the state court determined that the plaintiffs were entitled to judgment only after taking notice of the race of the Shelleys. The covenant stated:

> [H]ereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.[169]

When the state court enforced this covenant, it decided in favor of the plaintiffs on the ground that the Shelleys were not white.[170] Even though the racial motivation in *Shelley* originated with the private parties (the signatories of the restrictive covenant), the Missouri court's decision was racially discriminatory on its face. Under well-settled equal protection doctrine, a governmental classification that discriminates against members of a racial minority will be struck down unless it is necessary to achieve a compelling governmental goal.[171]

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owners who lived on the same block in St. Louis, Missouri, signed a covenant restricting occupancy of the property to white people. One parcel subject to the covenant was purchased from the white owners by a black couple, the Shelleys. Title was transferred first from the original owners to Fitzgerald, a straw party obtained by the realtor, and then to the Shelleys. The Kraemers, owners of another parcel subject to the covenant, sued both the Shelleys and Fitzgerald to enforce the covenant. The plaintiffs asked the state court to enjoin the Shelleys from continuing to occupy the property and to divest them of title. The trial court ordered the relief requested, and the Missouri Supreme Court affirmed. Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946), *rev'd*, 334 U.S. 1 (1948). A Michigan case with similar facts was consolidated with *Shelley* for argument and decision by the Supreme Court. Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947), *rev'd sub nom.* Shelley v. Kraemer, 334 U.S. 1 (1948).

167 *See, e.g.*, Wechsler, *supra* note 1, at 29.

168 *Shelley*, 334 U.S. at 6.

169 *Id.* at 4-5.

170 *Id.* at 5.

171 *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984). Indeed, "no [governmental] classification [burdening members of racial minorities] has been upheld since 1945. . . ." 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW § 18.5, at 363 (1986); *see also* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721,

Similarly, in *Palmore v. Sidoti*,[172] the Court invalidated a state court decision based on race under the equal protection clause. In *Palmore*, a Florida court, applying the "best interests of the child" test,[173] awarded custody of Ms. Palmore's child to her ex-husband because her new husband was black.[174] The Supreme Court first held that the state court decision was state action[175] based on race and therefore "subject to the most exacting scrutiny."[176] The Court conceded that the state's interest in protecting children was compelling and that "[t]here is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."[177] Nevertheless, the Court concluded that "the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother."[178]

Although *Palmore*, unlike *Shelley*, is not generally considered controversial,[179] the cases are consistent. In *Shelley*, the Missouri court held for the white property owners because the Shelleys were black; in *Palmore*, the Florida court held for Ms. Palmore's ex-husband because her husband was black. The lesson of *Shelley*, reaffirmed in *Palmore*, is simply that a private party is not entitled to have its wishes enforced by the government when such enforcement would be unconstitutional. The private motivation in such a case ceases to be private when it becomes the basis for governmental action.

Chief Justice Vinson, who wrote the majority opinion in *Shelley*, attempted to distinguish between a court order to a now-reluctant seller prohibiting him from selling to a black buyer and a court order to a seller who breached the covenant to pay damages to neigh-

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735 (1989) (five Justices agreed that strict scrutiny applies to all racial classifications by government, regardless of which race is burdened).

172 466 U.S. 429 (1984).

173 This standard was required by Florida law. *See* FLA. STAT. § 61.13(2)(b)(1) (1983), *cited in Palmore*, 466 U.S. at 433.

174 The Supreme Court characterized the Florida court as "entirely candid" because it "made no effort to place its holding on any ground other than race." *Id.* at 432. The Court thus had no difficulty concluding that the result in the state court action "would have been different had petitioner married a Caucasian male of similar respectability." *Id.*

175 *Id.* at 432 n.1 ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.") (citations omitted).

176 *Id.* at 432.

177 *Id.* at 433.

178 *Id.*

179 In fact, the decision in *Palmore* was unanimous and Chief Justice Burger's opinion comprised only four and one-half pages in the *United States Reports*.

boring property owners. In *Barrows v. Jackson*,[180] the Court held that a state court could not, consistent with the equal protection clause, order a party who breached a racially restrictive covenant to pay damages to the other parties to the covenant. The majority in *Barrows* reasoned that, "[i]f a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur."[181] The Court concluded that awarding such damages was state action that violated the fourteenth amendment.[182] In his *Barrows* dissent, Chief Justice Vinson argued that the state court should have been able to order the party who breached the covenant to pay damages because here, unlike *Shelley*, "there [was] no identifiable non-Caucasian . . . who will be denied any right to buy, occupy or otherwise enjoy the properties involved in this lawsuit."[183]

Barrows was correctly decided under the approach suggested in this Article. Although *Barrows*, unlike *Shelley*, did not involve a state court ordering a seller not to sell to a black buyer, a state court awarding damages for breach of a restrictive covenant would still have to base its decision on race. The only real difference between *Barrows* and *Shelley* was that the black buyers were parties to the lawsuit in *Shelley*, whereas in *Barrows* they were not. This distinction should not change the outcome. The state court in *Barrows* would still have to decide which party would prevail by considering the race of the non-party purchasers. As the majority in *Barrows* recognized, allowing a state court to award damages for the breach of a racially restrictive covenant would mean that "[s]olely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians."[184] Such a race-based decision by a state court is unconstitutional because it could not be justified as necessary to further any compelling governmental interest.[185]

Cases involving the enforcement of private contracts should be analyzed in a manner consistent with the reading of *Shelley* proposed here. For example, in *Rice v. Sioux City Memorial Park Cemetery*,[186] the

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180 346 U.S. 249 (1953).

181 *Id.* at 254.

182 *Id.*

183 *Id.* at 262 (Vinson, C.J., dissenting). "Indeed, the non-Caucasian occupants of the property involved in this case will continue their occupancy undisturbed, regardless of the outcome of the suit." *Id.*

184 *Id.* at 254.

185 *See supra* note 171 and accompanying text.

186 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd*, 348 U.S. 880 (1954), *vacated and cert. dismissed*, 349 U.S. 70 (1955).

plaintiff contracted to purchase a cemetery plot for her deceased husband, a Native American. The contract specified that "burial privileges accrue only to members of the Caucasian race."[187] When the cemetery refused to bury her husband, she sued for breach of contract. She contended that the racial restriction in the contract could not be enforced in light of *Shelley*.[188] The trial court held that the racial restriction was unenforceable but could be relied on to defend a breach of contract claim. The Supreme Court of Iowa affirmed.[189] The United States Supreme Court initially affirmed without an opinion,[190] but, on rehearing, it vacated that decision and dismissed the writ of certiorari, citing a newly passed Iowa statute.[191]

The Iowa court's decision in *Rice* is inconsistent with the reading of *Shelley* suggested in this Article. The state court correctly found the racial restriction unenforceable because a court would have had to use a racial classification to enforce the provision. The state court erred, however, when it permitted the cemetery to assert the racial restriction as a defense to the claim for breach. Considering the provision as a defense required the court to decide the case on the basis of the race of Mrs. Rice's deceased husband; she lost her claim in state court only because her husband was not a "member[] of the Caucasian race." The decision by the state court was just as clearly racially discriminatory as ordering the cemetery not to bury a non-white. The Iowa Supreme Court's distinction between "direct" or "active" aid of private discrimination and "indirect . . . support of private agreements containing restrictive covenants,"[192] like Chief Justice Vinson's distinction between *Shelley* and *Barrows*,[193] cannot support different results in cases in which the state court has explicitly based a decision on race. Any time a state court bases a decision on race, the decision should be subjected to strict scrutiny. The Iowa court's judgment in favor of the cemetery should have been struck down under that standard; no compelling goal justified the decision allowing the cemetery to rely on a discriminatory con-

187 *Id.* at 150, 60 N.W.2d at 112.

188 *Id.* at 154, 60 N.W.2d at 115.

189 *Id.* at 155-56, 60 N.W.2d at 115-16.

190 348 U.S. 880 (1954).

191 349 U.S. 70 (1955). The Iowa statute prohibited race discrimination by cemeteries, but it exempted those owned or operated by churches, other religious organizations, and established fraternal societies. *See id.* at 75-76.

192 *Rice*, 245 Iowa at 155, 60 N.W.2d at 115. The court stated that *Shelley* "may be distinguished from our present case in that [it involved] the exertion of governmental power *directly* to aid in discrimination. . . ." *Id.*, 60 N.W.2d at 115. The court characterized "the recognition of [racial] clauses in private contracts" as involving "no active aid . . . given their enforcement." *Id.*, 60 N.W.2d at 115.

193 *See supra* notes 180-85 and accompanying text.

tract term, and thereby to avoid paying damages.[194]

This interpretation of the constitutional limits on the power of state courts certainly restricts the types of provisions that private parties may include in their contracts. They could not expect a court to enforce a racial restriction like the one in the contract between Mrs. Rice and the cemetery. This does not mean, however, that a private cemetery is prohibited by the Constitution from exercising any choice in such a situation. The cemetery could still constitutionally refuse to contract to bury a particular person as long as the private racial motivation remained private.[195] Although Mrs. Rice would still be unable to bury her husband in that particular cemetery, the harm she would suffer in that case would have been inflicted solely by the cemetery.

Evans v. Newton[196] and *Evans v. Abney*[197] are consistent with the proposed reading of *Shelley*. The controversy in those cases arose from Senator Bacon's will. He devised land to the City of Macon, Georgia, as trustee, to be operated as a park for the exclusive use and enjoyment of whites. The Supreme Court decided in *Evans v. Newton* that the city's involvement in the operation and maintenance of the park brought the facility within the ambit of the fourteenth amendment and that therefore it could not remain segregated.[198] In the wake of that decision, the Georgia Supreme Court determined that the trust failed because Senator Bacon's purpose of creating a park exclusively for whites was impossible to achieve.[199] The

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194 Enforcement of private contracts could not be considered a compelling state goal in light of the numerous and varied reasons, unrelated to the Constitution, that state courts sometimes give for refusing to enforce private contracts. For example, state courts have refused to enforce private contracts that are deemed contrary to public policy. *See, e.g.*, Bovard v. American Horse Enters., 201 Cal. App. 3d 832, 841, 247 Cal. Rptr. 340, 345 (1988) (contract to purchase a business that manufactured drug paraphernalia unenforceable as contrary to public policy because it would facilitate illegal drug use); Blue Dolphin Invs., Ltd. v. Kane, 687 P.2d 533, 534 (Colo. App. 1984) (following RESTATEMENT (SECOND) OF CONTRACTS § 194 (1981) that "[a] promise that tortiously interferes with performance of a contract with a third person or a tortiously induced promise to commit a breach of contract is unenforceable on grounds of public policy").

195 Of course, race discrimination in making and enforcing private contracts is prohibited by section 1981. 42 U.S.C. § 1981 (1982); *see* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Runyon v. McCrary, 427 U.S. 160 (1976).

196 382 U.S. 296 (1966).

197 396 U.S. 435 (1970).

198 *Newton*, 382 U.S. at 302.

199 Evans v. Newton, 221 Ga. 870, 871, 148 S.E.2d 329, 330, *aff'd*, 382 U.S. 296 (1966). According to the Georgia Supreme Court, the doctrine of *cy pres* could not be used to reform the trust because Senator Bacon's will did not indicate that he had any general charitable purpose when he created the trust:

> Senator Bacon in the provision of his will creating [the trust] was specific in listing the persons for whose benefit the trust was created, the beneficiaries being "the white women . . . and white children of the City of

court therefore ordered that the property revert to Senator Bacon's heirs.[200] The United States Supreme Court affirmed.[201]

The Court merely followed the teaching of *Shelley* in these cases. In *Newton*, the Court found that Senator Bacon's private desire to maintain segregation was no longer private when the city became involved with the enforcement of the segregation. City officials could not, consistent with the fourteenth amendment, decide who could use the park on the basis of race. But the state court's judgment in *Abney* that the trust had failed and that the land should, therefore, revert to the heirs did not violate the Constitution. The state court followed common law principles in a race-neutral way; the decision not to apply *cy pres* to reform the trust was based not on anyone's race, but on an examination of Senator Bacon's wishes regarding the trust. Senator Bacon's desire that the park be operated on a segregated basis or not at all remained "private" as long as the state court did not have to base its actions on race.

Does the theory proposed here mean that a testator cannot leave his property to whomever he chooses? A testator may leave his property to any person he chooses, but he cannot expect a state court to enforce certain restrictions if such enforcement would violate the equal protection clause.

Consider a hypothetical situation: A testator, *T*, is white and believes that his children should marry someone of the same race. *T* has two children, *A* and *B*. *A* is married to a person who is not white. *T* decides for that reason to leave nothing to *A* in his will ("to my child, *A*, I leave nothing"). After *T*'s death, *A* challenges the will on the grounds that it would be unconstitutional for the state probate court to enforce the will as written because her disinheritance was based on racial prejudice. According to the theory proposed here, she would lose the suit. The state court, in enforcing the terms of the will, would not have to base its decision on any criteria prohibited by the Constitution.

Assume that *B* is not yet married. *T* decides to leave *B* his en-

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> Macon." He empowered the board of managers to exercise their discretion in also admitting "white men of the City of Macon, and white persons of other communities." He left no doubt as to his wish that the park be operated on a segregated basis. After expressing his kind feelings toward persons of the Negro race, he stated his reasons for limiting the beneficiaries of the trust to white persons as follows: "I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

Evans v. Abney, 224 Ga. 826, 830, 165 S.E.2d 160, 164 (1968), *aff'd*, 396 U.S. 435 (1970).

200 *Abney*, 224 Ga. at 833, 165 S.E.2d at 166.

201 396 U.S. 435 (1970).

tire estate on the condition that, if she marries, she marries a white man. After *T*'s death, *B* marries a person who is not white. She challenges the will and argues that enforcement of the racial restriction would be unconstitutional. According to the theory proposed here, she should prevail. To enforce the provision in the will, the probate court would have to decide the case by looking at the race of *B*'s husband; if he is white, *B* wins and if he is not white, *B* loses. The explicit use of a racial classification by the probate court would fail under strict scrutiny, just as it did in *Shelley*.

In this hypothetical case, *A* and *B* would both suffer the same harm if the will were enforced: they would each lose their share of *T*'s estate because of *T*'s feelings about interracial marriage. (Similarly, in *Shelley*, had the covenant been enforced, the Shelleys would have lost the property because of the racial prejudice of the other homeowners.) If they suffer the same harm, then what justifies the different outcomes of the two challenges to the will? In *A*'s case, *T*'s motivation remained private; the will simply excluded *A* from the list of beneficiaries. In *B*'s case, *T*'s private motivation became the basis for the state action, the court decision.

The foregoing analysis relates to an earlier point: there is a difference between the harm inflicted by a private party on another private party and the harm inflicted by government on a private party. In *A*'s case, the racial prejudice originated with *T* and the state remained neutral. In *B*'s case, the racial prejudice also originated with *T*, but the state would have made itself a part of that racial discrimination if it had enforced the racial restriction in the will. Such enforcement would constitute state action in violation of the equal protection clause of the fourteenth amendment.[202]

The third category of enforcement cases, the trespass cases, present one of the classic dilemmas of traditional state action doctrine. *Bell v. Maryland*[203] was another sit-in[204] case brought before the Supreme Court. Although the Court did not decide the case on constitutional grounds,[205] its facts raise the issue of state enforcement of private discrimination.

Bell concerned a sit-in demonstration in 1960 at Hooper's res-

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202 This approach does, of course, limit testamentary freedom. Testators and their lawyers will draft provisions (similar to the provision in *A*'s case) to avoid explicit classifications based on racial or other impermissible criteria. But because the equal protection clause specifically prohibits states from basing decisions on racial grounds unless such decisions are justifiable under strict scrutiny, the freedom of testators must be restricted.

203 378 U.S. 226 (1964).

204 *See supra* note 66.

205 The Supreme Court did not address the constitutional issues presented because of an intervening change in state law. After the defendants had been convicted, but prior to the Supreme Court's ruling, the Maryland Legislature enacted a statute that prohibited discrimination in public accommodations (including restaurants). As a re-

taurant in Baltimore. Twelve black students took seats in the restaurant and asked to be served. The hostess, acting on instructions from Mr. Hooper, asked them to leave and advised them that they would not be served " 'solely on the basis of their color.' "[206] The students were arrested for trespass[207] after Mr. Hooper swore out warrants; they were later convicted of the trespass charges.[208]

Consider the facts of *Bell* as the basis of two hypothetical cases to illustrate the application of the approach proposed here to the sit-in cases. In the first hypothetical case, assume that Mr. Hooper told the local police chief that he had a policy of not serving black customers in his restaurant and that if any police officer ever noticed a black customer in the restaurant, the officer should ask the customer to leave and forcibly remove him if necessary. A police officer walking by Hooper's restaurant sees a black man waiting to be seated. Pursuant to Mr. Hooper's instructions, the police officer asks the man to leave and, when the black man refuses, arrests him for trespassing. According to the suggested analysis, the man should be able to challenge successfully his arrest and/or conviction as a violation of the fourteenth amendment. The police officer, in enforcing Mr. Hooper's request, had to decide which person to arrest based on race. If the customer had been white, he would not have been arrested. The same would be true of a conviction in such a case. Neither a police officer nor a court can, consistent with the equal protection clause, impose a burden or grant a benefit based solely on race unless such discrimination can be justified as necessary to achieve a compelling governmental goal.

Assume now that Mr. Hooper, instead of leaving general instructions with the police, calls the police each time a black person enters his store. If the police arrest a black person after one of these calls, could the arrest or a subsequent conviction be successfully challenged under the equal protection clause? The answer should

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sult, the Court vacated the convictions and remanded the cases to state court for reconsideration in light of the new statute.

Most of the sit-in cases involving hotels, restaurants, theatres, and other places of public accommodation, would not be decided on constitutional grounds today. Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to a-6(1982), prohibits race discrimination in places of public accommodation that "affect interstate commerce" as defined in the statute. *Id.* § 2000a(b), (c). The constitutional issues may still arise, however, in other contexts; the statute contains an exclusion for private clubs, *id.* § 2000a(e), and does not apply to private homes.

206 *Bell*, 378 U.S. at 227-28.

207 The Maryland trespass statute made it a misdemeanor to " 'enter upon or cross over the land, premises or private property of any person . . . after having been duly notified by the owner or his agent not to do so.' " *Id.* at 228 (quoting MD. ANN. CODE art. 27, § 577 (1957)).

208 *Id.* Their convictions were subsequently affirmed by the Maryland Court of Appeals, 227 Md. 302, 176 A.2d 771 (1962), *rev'd*, 378 U.S. 226 (1964).

be no, because the state actor (the police officer) did not act on the basis of race. He arrested a person who refused to leave after requested to do so by the restaurant owner.

The harm to the black person in both cases is the same. He cannot get served in Hooper's restaurant and is arrested if he refuses to leave. What justifies the different treatment in the two cases? In the first case, Mr. Hooper's private wish to discriminate on the basis of race was not private when it became the basis for the state action of arresting and/or convicting the black customer. In the second case, Mr. Hooper's private wish to discriminate remained private; the state action in that case was based on Mr. Hooper's request that a particular customer leave the premises.

As in the cases involving contracts and wills and trusts, the proposed enforcement approach means that private parties will still be able to ask the state to enforce certain of their wishes. But they will not be able to do so if such enforcement would require a state actor to make decisions based on constitutionally impermissible criteria or otherwise take action that would violate the Constitution. There is no exception to the fourteenth amendment when a state actor is merely enforcing a private motivation. The distinction drawn by the fourteenth amendment between state action, which is covered by its terms, and private action, which is not, means that the state may enforce Mr. Hooper's wishes in the second case, however distasteful they may be to others, but not in the first case.

CONCLUSION

The state action cases involving action by both state actors and private parties present difficult analytical problems for courts. The Supreme Court should continue to treat state action as a threshold requirement that must be satisfied before the substantive provisions of the fourteenth amendment are triggered. Adopting the broad definition of state action suggested in Part I would acknowledge the important differences between state action and private conduct and would permit the Court to maintain state action as a threshold element to a fourteenth amendment claim.

Once the Court has determined that state action is present, the Court should review the state action, not the private action, in light of fourteenth amendment values. According to the approach proposed in this Article, the Court should separate the state action from the private conduct because only the former is subject to the restrictions of the fourteenth amendment. As posited in Part II, if the state action provided the impetus for, by compelling or encouraging, private action that would be unconstitutional if undertaken by a state actor, that state action should be deemed violative of the Con-

stitution. Even when the impetus for the private conduct came from a private party, the state should not be permitted to violate the fourteenth amendment in order to enforce a private arrangement or vindicate private interests, as demonstrated in Part III.

This approach to state action cases allows courts to recognize that private and state action may intersect and result in the deprivation of constitutional rights. But the state action and private conduct must be separated analytically in order to correctly determine whether the state action was responsible for a constitutional violation. This separation of state action from private action would eliminate the need for courts to attempt to "attribute" the conduct of private parties to the state. Most importantly, this approach would preserve the public/private dichotomy that underlies the fourteenth amendment.